SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 549.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

vs.

THE AMERICAN CHICLE COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States, before you, or some of you, between The American Chicle Company, plaintiff, and The United States of America, defendant, a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected and changed and speedy justice done to the parties aforesaid in their behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States to be holden at the Capital in Washington, District of Columbia, within thirty days from the date hereof; that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 30th day of August, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk of the District Court.

2 The foregoing writ is hereby allowed.

J. C. HUTCHESON, JR.,
U. S. District Judge.

Aug. 30, 1919.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alex. Gilchrist, jr., clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages numbered from four to nineteen inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, plaintiff in error, vs. The American Chicle Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 13th day of September in the year of our Lord one thousand nine hundred and nineteen and

of the Independence of the United States the one hundred and forty-fourth.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

3 L 19/61. Supreme Court of the United States of America. The United States of America, plaintiff in error, defendant below, vs. The American Chicle Company, defendant in error, plaintiff below. Writ of error. Francis G. Caffey, attorney for U. S. U. S. District Court, S. D. of N. Y. Filed Aug. 30, 1919.

4 *Petition.*

United States District Court, Southern District of New York.

AMERICAN CHICLE COMPANY, PETITIONER,
against
UNITED STATES OF AMERICA.

The petition of American Chicle Company respectfully alleges:

I. That at all times hereinafter mentioned the petitioner was and still is a corporation organized and existing under the laws of the State of New Jersey, a citizen of said State, with the right to do business in the State of New York, and having an office at 19 West 44th Street, in the city, county, and State of New York.

II. That the petitioner is, and at all times hereinafter mentioned has been, engaged in the business of manufacturing chewing gum, and selling the same to wholesale dealers therein, but has at no time sold its said product to retailers or to consumers; that in the regular course of business, and necessarily, in order that the business may be properly and profitably conducted, it manufactures chewing gum at its various factories and there prepares and makes it ready for sale to its customers and either retains it until sold at the place of manufacture or from time to time transports said manufactured and prepared products from the factory, or place where the processes of manufacture and preparation for sale have been conducted to one of its other factories or warehouses, as the state of the stock
5 therein, or the condition of the trade, may demand; that such transportation between factories and warehouses is no part of the sale or consumption of said products and no right of ownership or possession of the petitioner in said manufactured product so transported is surrendered, or in anywise affected by such movement from the particular place of manufacture and preparation to any other of its factories or warehouses, but that before and after such movement, said product is the absolute property of petitioner but ready, as it was before such movement, for sale to wholesalers.

III. That pursuant to "An act to increase the internal revenue, and for other purposes," approved October 22nd, 1914, being chapter 331, Statutes at Large, part 1, volume 38, page 745, and a joint resolution of Congress, approved December 17, 1915, and entitled "Joint resolution extending the provisions of the act entitled 'An act to

increase the internal revenue, and for other purposes,' approved October twenty-second, nineteen hundred and fourteen, to December thirty-first, nineteen hundred and sixteen," the said joint resolution being chapter 4, Statutes at Large, part 1, volume 39, page 2, petitioner purchased from the United States and affixed to its said products internal revenue stamps, as provided in said act; that on September 8th, 1916, there was approved an "Act to increase the internal revenue, and for other purposes," which said act is chapter 463, part 1, vol. 39, Statutes at Large, page 756, and went into effect on September 9th, 1916, and by section 411 thereof it was
6 provided that the Commissioner of Internal Revenue should make allowance for or redeem such of the stamps provided for in said act of October 22, 1914, as had not been used, if presented within two years after the date of their purchase. By section 24 of said act of October 22nd, 1914, it was provided that, all stamps provided for in this act, unused after Jan. 1, 1916, should be redeemed from the holder under rules prescribed by the Secretary of the Treasury; that upon September 9th, 1916, the petitioner owned and had in its possession products in its various factories and warehouses to which, in accordance with the provisions of act of October 22, 1914, were affixed uncanceled internal revenue stamps, to the amount of $6,318.56. Said stamps had been purchased by petitioner in the amounts and from the collectors of internal revenue hereinafter set forth:

V. H. Riordan, Esq., collector of internal revenue for the 28th district of New York	$966.20
E. H. Barber, Esq., collector of internal revenue for the 6th district of Missouri	1,680.20
Julius T. Smetanka, Esq., collector of internal revenue for the 1st district of Illinois	310.92
Ephraim Lederer, Esq., collector of internal revenue for the 1st district of Pennsylvania	316.92
Harry H. Weiss, Esq., collector of internal revenue for the 18th district of Ohio	2.76
Herman C. H. Herold, Esq., collector of internal revenue for the 5th district of New Jersey	1,841.16
Seth W. Jones, Esq., collector of internal revenue for the 1st district of Portsmouth, New Hampshire	1,200.40
	6,318.56

7 That none of the products of the petitioner to which any of said stamps were affixed had been sold or contracted to be sold, but all of said products were on the ninth day of September, 1916, owned by and in the possession of petitioner, but had been removed from the factory at which they were manufactured and prepared for sale, to other factories or warehouses of petitioner in other parts of the United States, as hereinbefore set forth. All of said stamps, so affixed to said products of petitioner, were purchased within two years of the application hereinafter set forth, for allow-

ance or redemption, as provided in said act of October 22nd, 1914, and in said act of September 8th, 1916.

IV. On September 29th, 1916, the Treasury Department ruled that under said acts of October 22nd, 1914, and September 8th, 1916, allowance would be made for stamps affixed to goods, that were not removed from the factory, prior to September 8th, 1916, the said ruling being evidenced by communication signed by G. E. Fletcher, deputy commissioner, as follows:

TREASURY DEPARTMENT,
Washington, D. C., Sept. 29, 1916.

In the case of stamps affixed to goods that were not removed from the factory, prior to Sept. 8, 1916, the requirement is either that the stamps be detached and presented, or a deputy collector's certificate be filed to the effect, that he made an endorsement on the stamps that claim was filed.

(Signed) G. E. FLETCHER,
Deputy Commissioner.

8 The petitioner contended that if the stamps were unused if affixed to goods not removed from the factory in which they were manufactured before September 8th, 1916, that they were unused under the terms of said acts, if the goods were removed from the initial factory to some other factory or warehouse of petitioner, but not sold or contracted for sale before that date, and therefore, on May 17th, 1917, petitioner, in compliance with the rules prescribed by the Secretary of the Treasury, filed with the collector of internal revenue for the third district, its claim for a refund of $6,318.56, the amount of said stamps, and on May 21st, 1917, received from said collector a letter returning said claim, said letter being as follows:

"Form 46 for the refund of unused revenue stamps is returned herewith, for the reason that since the stamps were not purchased in this district and were in fact purchased in several districts, the proper place to file this form is with the collector of internal revenue, Baltimore, Md."

Pursuant thereto on May 25th, 1917, said claim in proper form and substance, was filed with the collector of internal revenue, Baltimore, Md. On July 20th, 1917, the Treasury Department rejected said claim, the decision being in the form of a letter from Acting Commissioner of Internal Revenue to the collector of internal revenue at Baltimore, Md. Said letter being as follows:

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Md., July 20, 1917.

JOSHUA W. MILES, Esq.,
Collector of Internal Revenue, Baltimore, Maryland.

9 SIR: The claim of the American Chicle Company, # 1 Madison Ave., New York City, forwarded with your letter of June 2, 1917, for $6,318.56, the face value of proprietary stamps affixed to chewing gum in its possession after September 8, 1916, which had

been removed from the factory premises prior to September 9, 1916, has been examined and is hereby rejected, for the reason that the stamp tax on this chewing gum accrued and was properly paid upon its removal from the factory premises for consumption or sale.

Respectfully,

(Signed) DAVID A. GATES,
Acting Commissioner.

V. The foregoing embraces all the facts known to the petitioner, on which this claim was founded, and this deponent now claims that said stamps were unused within the provisions of said acts, and that it is justly entitled to have the sum of six thousand three hundred and eighteen dollars and 56/100 ($6,318.56) refunded and it now asks and demands the same.

And this petitioner further makes oath, that it is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refund of the above amount, or any part thereof, except as herein above set forth.

Wherefore, the petitioner prays judgment against the United States of America for six thousand three hundred and eighteen dollars and fifty-six cents ($6,318.56) with interest from the 8th day of September, 1916, together with the costs of this suit.

AMERICAN CHICLE COMPANY,
Petitioner.

SPOONER & SPOONER,
Attorneys for Petitioner.

Office and post-office address, 14 Wall Street, Borough of Manhattan, New York City.

10 STATE OF NEW YORK,
County of New York, ss.:

Darwin R. James, being duly sworn, deposes and says that he is president of American Chicle Company, petitioner in the foregoing action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. That the reason this verification is not made by petitioner personally is that petitioner is a foreign corporation; that the grounds of deponent's belief and the sources of his information concerning all matters in said petition stated to be alleged upon information and belief, are derived from his acquaintance with the business of petitioner as its president.

DARWIN R. JAMES.

Sworn to before me this 23rd day of August, 1918.
[SEAL.] SAMUEL NADLER.

My commission expires 3/30, 1919. Notary Public, New York County, No. 81. New York Register No. 9074.

Filed Aug. 26, 1918.

11 *Demurrer.*

United States District Court, Southern District of New York.

AMERICAN CHICLE COMPANY, petitioner,
against
UNITED STATES OF AMERICA.

The defendant, by its attorney, Francis G. Caffey, United States attorney for the Southern District of New York, appearing herein, respectfully shows to this court and alleges:

The defendant demurs to the alleged cause of action set forth in the petition upon the grounds:

1. That it appears upon the face thereof that the petition does not state facts sufficient to constitute a cause of action.

Wherefore, the defendant demands judgment that the petition be dismissed together with the costs and disbursements of this action.

FRANCIS G. CAFFEY,
United States Attorney,
Attorney for the Defendant.

Office and post-office address, Old Post Office Building, borough of Manhattan, city of New York.

12 Vincent H. Rothwell, assistant United States attorney for the Southern District of New York, certifies that he has the within entitled action in charge and that the above demurrer is not interposed for purpose of delay and that he verily believes that the petition is bad in law and that a termination of the question raised by the demurrer will terminate the litigation and so tend to expedite disposition of the case.

VINCENT H. ROTHWELL,
Assistant United States Attorney.

Filed Dec. 31, 1918.

13 United States District Court, Southern District of New York.

THE AMERICAN CHICLE COMPANY, petitioner,
against
UNITED STATES OF AMERICA, defendant.

Demurrer to petition on ground that it does not state facts sufficient to constitute a cause of action.

SPOONER & SPOONER, Esqs.,
JOHN C. SPOONER,
CHARLES P. SPOONER,
Of Counsel, for Petitioner.

FRANCIS G. CAFFEY, Esq., *U. S. Attorney,*
VINCENT H. ROTHWELL, Esq.,
Of Counsel, for United States of America.

KNOX, D. J.: This case will admit of an extended opinion as to the grounds upon which I base my decision. I do not consider, however, that a balancing of the various sections of the acts involved is necessary. It suffices to say from a consideration of all the legislation involved, together with the Treasury decisions promulgated by that department, I believe the demurrer must be overruled. From this it follows that I am satisfied that the tax now before me was not laid upon the manufacture, as such, of chewing gum, but that it was the intention of Congress to tax the gum when it began its move-
14 ment from the manufacture into consumption and trade.

It is apparently conceded that so long as the gum remained upon the premises of original manufacture the tax did not necessarily accrue upon the completion of the physical operation of manufacture. All that was necessary, according to the Government's contention, was that some time before the gum should be removed from the factory (whenever that should be) "for consumption and sale," tax stamps should be affixed thereto.

It seems to me that a removal of the gum from the factory where it was made to a storehouse or wareroom of the manufacturer (even if in a distant city), does not constitute the removal contemplated by the act.

This conclusion would appear to be somewhat supported by the fact that the amount of the tax is determined by the retail price or value of the article itself. Assuming that the retail price or value was fluctuating, it would seem that the best time to determine the tax would be just before the article began its movement from the possession and control of the manufacturer into the channels of trade or consumption. The place from which the movement begins is immaterial so long as the possession and control and responsibility of the manufacturer has not changed.

Nor as an administrative matter do I see why the Government, upon such construction, is not adequately protected. The report of the foreman of a manufacturer's warehouse would serve the purpose of the Government officials quite as well as would the report of the manufacturer's factory superintendent.

My attention has been called to section 3397 of the Revised
15 Statutes wherein it is provided that "Whenever any cigars are removed from any manufactory or place where cigars are made," and the necessary stamps shall not have been affixed and various other things done, the offender shall be liable to certain penalties. This section does not aid in the interpretation of the statute now before me. There is in the latter no language so specific and definite as that contained in section 3397. The penal provisions of section 20 of the act of October 22, 1914, are limited to removal of the goods which are subject to tax from the premises of such manufacturer or maker. There is no reason why the same manufacturer

should not have premises in one or more places—they need not be the premises of original manufacture. Demurrer overruled.

March 21, 1919.

JNO. C. KNOX,
U. S. District Judge.

Filed Mar. 22, 1919.

16 At a stated term of the District Court of the United States of America for the Southern District of New York, held at the United States Court and Post Office Building in the borough of Manhattan, city of New York, on the 23rd day of May, 1919.

Present: Hon. John Clark Knox, United States District Judge.

AMERICAN CHICLE COMPANY, PETITIONER,
vs.
UNITED STATES OF AMERICA.

This cause having duly come on before me upon demurrer filed by the defendant to the complaint herein, and after hearing Vincent H. Rothwell, Esq., assistant U. S. attorney, in support of said demurrer, and Charles P. Spooner, Esq., in opposition thereto, and due deliberation having been had.

Now, on motion of Spooner & Spooner, attorneys for the petitioner, to overrule the demurrer and sustain the complaint herein upon the grounds that the complaint herein does state facts sufficient to constitute a cause of action, it is

Ordered, that the said complaint be and the same hereby is in all respects sustained; and it is

Further ordered, that the demurrer herein be and the same hereby is overruled, and it is

Further ordered, that judgment be entered for the plaintiff herein for the amount demanded in the complaint, with interest.

JNO. C. KNOX,
U. S. District Judge.

Notice of settlement waived.

FRANCIS G. CAFFEY,
Attorney for Defendant.

Filed May 23, 1919.

17 United States District Court, Southern District of New York.

AMERICAN CHICLE COMPANY, PETITIONER,
against
UNITED STATES OF AMERICA.
L. 19–61.

This cause having come on for hearing before Hon. John Clark Knox, U. S. district judge, upon a demurrer filed by the defendant

herein, at a stated term held on the 3rd day of March, 1919, and after hearing Vincent H. Rothwell, Esq., assistant U. S. attorney, in support of the said demurrer, and Charles P. Spooner, Esq., in opposition thereto, and due deliberation having been had thereon, and an order having been entered on the 26th day of May, 1919, wherein it was

Ordered, that the demurrer to the petition herein be overruled and the said petition be in all respects sustained, and

Further ordering, that the petitioner herein, the American Chicle Company, have judgment against the defendant, United States of America, for the amount demanded in the complaint.

Now, on motion of Charles P. Spooner, Esq., one of the attorneys for the petitioner, it is

Adjudged, that the petitioner, the American Chicle Company, have judgment against the defendant, the United States of America, and that the petitioner recover from the defendant, the sum of six thousand, three hundred eighteen dollars, fifty-six cents ($6,318.56).

Dated June 6, 1919.

ALEX GILCRIST, Jr., *Clerk.*

Filed June 6, 1919—11.25 a. m.

18 *Assignments of error.*

United States District Court, Southern District of New York.

THE AMERICAN CHICLE COMPANY, PLAINTIFF,
against
THE UNITED STATES OF AMERICA, DEFENDANT.

Now comes the defendant, by Francis G. Caffey, United States attorney for the Southern District of New York, his attorney, and assigns error in the decision of the United States District Court for the Southern District of New York, as follows:

1. The court erred in overruling the demurrer interposed by the United States to the petition herein.

2. The court erred in construing section 20 of the act of October 22, 1914.

Wherefore defendant prays that for the errors aforesaid the judgment be reversed with costs.

Dated New York, N. Y., August 30, 1919.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Defendant.

Filed Aug. 30, 1919.

19 United States District Court, Southern District of New York.

AMERICAN CHICLE COMPANY
vs.
UNITED STATES OF AMERICA. } L. 19/61.

It is hereby stipulated and agreed that the following papers shall constitute the record on appeal, to the United States Supreme Court, in the above-entitled action:

1. Petition.
2. Demurrer to petition.
3. Opinion, Knox, J.
4. Order for judgment.
5. Judgment.
6. Assignment of errors.
7. Writ of error.
8. Citation.
9. Stipulation as to record.

Dated September 5th, 1919.

SPOONER & SPOONER,
Attorneys for Plaintiff.
FRANCIS G. CAFFEY,
United States Attorney, Attorney for Defendant.

Filed Sept. 5, 1919.

20 By the honorable one of the judges of the District Court of United States for the Southern District of New York in the Second Circuit, to The American Chicle Company:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capital in Washington, District of Columbia, on the 29th day of September, 1919, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment of the said District Court in said writ of error mentioned should not be corrected and justice done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 30th day of August, in the year of our Lord one thousand nine hundred and nineteen and of the independence of the United States the one hundred and forty-fourth.

[SEAL.]

J. C. HUTCHESON, JR.,
Judge of the District Court of the United States for the Southern District of New York in the Second Circuit.

21 Court Docket L. 19/61. Form No. 336. Supreme Court of the U. S. The United States of America, plaintiff in error,

defendant below, versus The American Chicle Company, defendant in error, plaintiff below. Original citation.

FRANCIS G. CAFFEY,
United States Attorney, Attorney for U. S.

Filed Sep. 4, 1919. U. S. District Court, S. D. of N. Y.
Due service of a copy of the within is hereby admitted.

SPOONER & SPOONER,
Attorney for Deft. in Error.

New York, Sept. 3, 1919.

(Supreme Court of the United States. The United States of America, plaintiff in error, agst. The American Chicle Company, defendant in error. Transcript of record. Error to the District Court of the United States for the Southern District of New York. Office of the Clerk Supreme Court U. S. Sep. 19, 1919.)

(Endorsed on cover:) File No. 27304. S. New York, D. C. U. S. Term No. 549. The United States of America, plaintiff in error, vs. The American Chicle Company. Filed September 19th, 1919. File No. 27304.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

UNITED STATES OF AMERICA, plaintiff in error, v. AMERICAN CHICLE COMPANY. } No. 175.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

This case is here on writ of error to review the judgment of the District Court by which defendant in error recovered $6,318.56, being the amount paid for revenue stamps purchased for use in compliance with the Revenue Act of October 22, 1914 (38 Stat., c. 331, pp. 745, 754), and which, it was alleged, were unused when that Act ceased to be in effect.

STATUTES INVOLVED.

The pertinent portions of the Act of October 22, 1914 (38 Stat., c. 331, p. 754), are as follows:

> SEC. 5. And there shall also be levied, collected, and paid, for and in respect to the preparations, matters, and things mentioned

and described in Schedule B of this Act, manufactured, sold, or removed for sale, the several taxes or sums of money set down in words or figures against the same, respectively, or otherwise specified or set forth in Schedule B of this Act.

SEC. 20. That every manufacturer or maker of any of the articles or commodities provided for in Schedule B, or his foreman, agent, or superintendent, shall at the end of each and every month make, sign, and file with the collector of internal revenue for the district in which he resides a declaration in writing that no such article or commodity has, during such preceding month or time when the last declaration was made, been removed, or carried, or sent, or caused or suffered or known to have been removed, carried, or sent from the premises of such manufacturer or maker other than such as have been duly taken account of and charged with the stamp tax, on pain of such manufacturer or maker forfeiting for every refusal or neglect to make such declaration $100; and if any such manufacturer or maker, or his foreman, agent, or superintendent shall make any false or untrue declaration, such manufacturer or maker, or foreman, agent, or superintendent making the same shall be deemed guilty of a misdemeanor, and upon conviction shall pay a fine of not more than $500, or be imprisoned not more than six months, or both, at the discretion of the court.

Section 22 provides for the sale of stamps to be attached to the articles included in Schedule B.

Schedule B contains, among other things, the following:

> Chewing gum or substitutes therefor: For and upon each box, carton, jar, or other package containing chewing gum of not more than $1 of actual retail value, 4 cents; if exceeding $1 of retail value, for each additional dollar or fractional part thereof, 4 cents; under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

Section 24 contained the following proviso:

> *Provided,* That on the day after the thirty-first day of December, nineteen hundred and fifteen, the taxes levied under this Act shall no longer be levied and collected, but all taxes arising or accruing before said date shall continue to be collectible under the terms of this Act.

The same section also provided that:

> All stamps provided for in this Act unused after the aforesaid date shall be redeemed from the holder thereof, under such rules as the Secretary of the Treasury may prescribe.

The Act of September 8, 1916 (39 Stat., c. 463, sec. 411, pp. 756, 793), also provides:

> That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, may make allow-

ance for or redeem stamps issued under authority of the Act approved October twenty-second, nineteen hundred and fourteen, entitled "An Act to increase the internal revenue, and for other purposes," and the joint resolution approved December seventeenth, nineteen hundred and fifteen, entitled "Joint resolution extending the provisions of the Act entitled 'An Act to increase the internal revenue, and for other purposes,' approved October twenty-second, nineteen hundred and fourteen, to December thirty-first, nineteen hundred and sixteen," to denote the payment of internal-revenue tax, and which have not been used, if presented within two years after the purchase of such stamps.

THE FACTS.

The defendant in error was a manufacturer of chewing gum and sold its product to wholesale dealers. It had various factories at which chewing gum was made and prepared for sale. Some of the product was held at the factories until sold and then shipped direct to customers. Some of it, however, was, from time to time, shipped from the place of manufacture and held for sale in warehouses maintained by the defendant in error at various places throughout the country as the state of the stock or the condition of the trade demanded.

When the Act levying this tax ceased to be in effect, defendant in error had attached stamps to a considerable quantity of its unsold product. Some

of this had not been removed from the place of manufacture. But stamps to the amount of $6,318.56 had been attached to products which had been removed from the place of manufacture and were held for sale in warehouses. A demand was made for the redemption of all stamps attached to unsold products. Those on the product still at the place of manufacture were redeemed. But the redemption of those on products removed from the factory and held elsewhere for sale was refused.

RULINGS OF COURT BELOW.

The foregoing facts all appeared in the petition below. The Government demurred. The demurrer was overruled, and, no further pleading being filed, judgment was rendered for the amount claimed.

QUESTIONS INVOLVED.

Section 5 of the Act would seem to be open to the construction that the tax was levied on all goods manufactured after the passage of the Act, whether sold or removed or not, and also upon all previously manufactured and thereafter sold or removed. The Commissioner, however, collected the taxes in controversy upon only such goods as he regarded as having been "removed for sale." The specific question presented, therefore, is whether goods which, after being manufactured, are removed from the factory and held to meet the demands of the trade in warehouses throughout

the country from which they are to be sold, have been "removed for sale" within the meaning of the Act.

BRIEF.

I.

THE TAX IS ASSESSED AGAINST THE MANUFACTURER.

A study of the above-cited sections and also sections 17, 18, 19, and 21 of the Act of October 22, 1914, show conclusively that Congress intended to make *the parties manufacturing the articles* liable for the tax. These sections, in placing the tax, either use the words "manufacturer or maker" or state that the tax shall be collected upon articles "manufactured, sold, or removed for sale." This is recognized by the district judge, but he holds that the tax was not due until the gum "began its movement from the manufacturer into consumption" and that a removal from the factory to the owner's warehouse (even in a distant city), without a change of ownership, is not a removal from the premises of the manufacturer. Apparently his idea is that the only removal that will render the tax due is one made as the result of at least a contract of sale.

II.

THE MANUFACTURER BECAME LIABLE FOR THE TAX WHEN THE GUM STARTED ON ITS WAY FROM THE FACTORY WHERE MADE TO THE VARIOUS WAREHOUSES.

The act provides that the tax shall be levied, collected, and paid on articles "manufactured,

sold, or removed for sale." It may, for the present purposes, be conceded that no manufacturer is liable for the tax while the products remain on the *factory* premises. The Commissioner granted a refund for stamps attached to such products. However, in this case the gum *was removed from the factory* and placed in various warehouses throughout the country for the purpose of convenient sale. The whole case is really reduced to this: The act says that the tax shall be due when the product is either "*sold*" or "*removed for sale.*" It is essential to determine what Congress meant by the term "removed for sale."

Sections 17, 18, 19, and 20 of this Act are penal provisions directed toward the prevention of the removal or articles from the factory before the stamps are properly affixed, and thus plainly imply that the tax must be paid before the product leaves the factory.

The language of the Act of June 13, 1898 (30 Stat., c. 448, pp. 448–463), is practically identical with the present Act. Pursuant to this Act, Treasury Decision 19379 was promulgated, holding that "stamps must be affixed by the maker or manufacturer to packages of chewing gum or substitutes therefor before the same are removed from the factory for consumption or sale." In other words, in the 1898 Act the Treasury Department fixed the tax before it was removed from the fac-

tory. Now the Treasury Department has construed the present Act in the same manner as it construed the 1898 Act, and has passed similar regulations to enforce same. Treasury Decision 2063, promulgated in pursuance of this Act, provides: "On and after December 1, 1914, stamps must be affixed by the maker or manufacturer to packages of chewing gum or substitutes therefor before the same are removed from the factory for consumption or sale." Thus it will be seen that the policy adopted under the 1898 Act—to fix the tax when removed from the factory—has been closely followed under the later Act of 1914. This construction has also been placed on the present Act. The above construction placed on the 1898 and 1914 Acts should have controlling weight, for it has been frequently held by this court that where Congress enacts a law identical with a previous Act, it, in effect, ratifies the construction placed upon the earlier Act by the department charged with its enforcement. *United States* v. *Falk,* 204 U. S., 143; *United States* v. *Humanos,* 209 U. S., 337; *Komado* v. *United States,* 215 U. S., 392.

The reason moving Congress to draw the line at the moment when the product leaves the factory is obvious. If manufacturers were allowed to remove their products without affixing the stamps to various warehouses all over the country, it will at once be seen how greatly the difficulty of preventing fraud and evasion of the law would increase.

To require the tax to be paid before the product leaves the factory is in accord with the long-continued practice of Congress in levying similar taxes. The taxes on liquors and cigars must be paid before they are removed from the factory or the warehouse in which they are held under Government supervision. Indeed, the language " removed for sale " in this Act is not fairly susceptible of any other construction.

Judge Knox, in overruling the demurrer, said:

> I am satisfied that the tax now before me was not laid upon the manufacture as such, of chewing gum, but that it was the intention of Congress to tax the gum when it began its movement from the manufacture into consumption and trade.

From this view the Government need not dissent. But in this case surely the gum had started its movement into sale when it left the factory where made. It is true that the product did not change ownership, but, as admitted in the defendant's petition, it was moved to warehouses in distant cities, " as the state of the stock therein, or the condition of the trade may demand." In other words, the defendant in error has warehouses all over the United States conveniently located to its customers. It is not contended that the gum was removed from the factory on account of lack of storage room, but to facilitate distribution and sale. If the stock in a particular warehouse is low because

near-by customers have been buying considerable amounts, then the factory will ship a consignment to the warehouse to meet the demand. There can be no doubt that when the manufacturer moves the chewing gum for such a purpose it is moved for sale. It has, using the language of Judge Knox, "begun its movement from the manufacture into consumption and trade." When an article is manufactured to be sold, and manufacture has been completed, every movement in the direction of the consumer is necessarily a step "in its movement into consumption and trade." If the manufacturer should open a retail store, it would not be contended that he could place his products on his shelves without putting stamps on them. No more can he put them in convenient places for sale to the wholesale trade without paying the tax.

Section 24 expressly provides that all taxes *accruing* before the Act ceases to be in effect shall be collected and that only such stamps *as have not been used* shall be redeemed. The tax accrues when the law requires the stamps to be attached, and when so attached they are *used*. In this case the gum had been removed for sale and the stamps attached. They were, therefore, not *unused* when the Act ceased to be in effect.

The view of the District Judge that the removal must be in connection with a sale previously made or contracted denies to the words "or removed for sale" any effect whatever.

CONCLUSION.

It is respectfully submitted that the Commissioner was correct in refusing to redeem the stamps, and the judgment should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

R. P. FRIERSON,
Attorney.

NOVEMBER, 1920.

○

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 175.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

AMERICAN CHICLE COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

This case is here on writ of error to review the judgment of the District Court by which the defendant in error recovered $6,318.56, being the amount paid for revenue stamps purchased for use in compliance with the Revenue Act of October 22, 1914 (38 Stat. c. 331, pp. 745, 754), and which it was alleged, were unused when that Act ceased to be in effect.

The facts appear in the petition filed, under the so-called Tucker Act, in the court below. The Government demurred. The demurrer was overruled, and, no further pleading being filed, judgment was rendered for the amount claimed.

The facts set forth in the petition are substantially as follows: That the petitioner was, at all times, engaged in the business of manufacturing chewing gum and selling it to wholesale dealers only, and that in the regular course of business, and necessarily in order to properly and profitably conduct the same, it manufactured chewing gum at its various factories and there prepared and made it ready for sale to its customers, and either retained it, until sold, at the place of manufacture, or from time to time transported it from the factory or place where the process of manufacture and preparation for sale had been conducted, to one of its other factories or warehouses, as the state of the stock therein, or the condition of the trade, might demand; that such transportation between factories and warehouses was no part of the sale or consumption of the product and no right of ownership or possession of the petitioner, in said manufactured products so transported, was surrendered, or in any wise affected by such movement from the particular place of manufacture and preparation to any other of its factories or warehouses, but that before and after such movement, said product was the absolute property of petitioner, but ready, as it was before such movement, for sale to wholesalers.

That pursuant to an Act of Congress, approved October 22, 1914 (Chapter 331, Stat. at Large, Part 1, Vol. 38, p. 745), and a joint resolution of Congress approved December 17, 1915 (Chapter 4, Stat. at Large, Part 1, Vol. 39, p. 2), the Petitioner

purchased from the United States, and affixed to its products, internal revenue stamps, as provided in said act; that on September 8, 1916, there was approved an "Act to increase the internal revenue and for other purposes" (Chapter 463, Stat. at Large, Part 1, Vol. 39, p. 756), which went into effect on September 9, 1916, and that by Section 411 of said Act it was provided that the Commissioner of Internal Revenue should make allowance for or redeem such of the stamps provided for in said Act of October 22, 1914, as had not been used, if presented within two years after the date of their purchase; that by Section 24 of said Act of October 22, 1914, it was provided, that all stamps provided for in said Act, unused after January 1, 1916, should be redeemed from the holder under rules prescribed by the Secretary of the Treasury; that upon September 9, 1916, the Petitioner owned and had in its possession, products in its various factories and warehouses to which, in accordance with the provisions of the Act of October 22, 1914, were affixed uncancelled internal revenue stamps, to the amount of the judgment asked for (then follows the amount that these stamps were purchased for from different collectors, aggregating the sum for which judgment was sought); that none of the products of the Petitioner to which any of said stamps were affixed, had been sold or were contracted to be sold, but all of said products were on the 9th day of September, 1916, owned by and in the possession of Petitioner, but had been removed from the factory at which they were manufactured and prepared for sale, to other factories and warehouses of Petitioner in other parts of the United States; that all of such stamps, so affixed, were purchased within two years of the application for allowance or redemption, as provided by

said Act of October 22, 1914, and in said Act of September 8, 1916; that on September 29, 1916, the Treasury Department ruled that under said Acts of October 22, 1914, and September 8, 1916, allowance would be made for stamps affixed to goods that were not removed from the factory, prior to September 8, 1916, the letter in which said rule was made being set forth in the petition.

There then follows allegations showing due proceedings on the part of the Petitioner before the Treasury Department in compliance with the Acts of Congress and the rules prescribed by the Secretary of the Treasury to secure the allowance or redemption of said stamps, resulting finally in the rejection on July 20, 1917, of the Petitioner's claim, the letter by the Acting Commissioner of Internal Revenue rejecting said claim being set forth. The petition ends with the necessary allegation that the Petitioner is not indebted to the United States in any amount whatever, and that no claim had theretofore been presented for the refund of the amount claimed, or any part thereof, except as set forth in the petition.

Outline of Argument.

For the convenience of the court, we shall adopt the arrangement of the numbers and headings of the brief of the Plaintiff in Error, setting forth in the course of the argument the pertinent portions of the various acts involved.

I.

The tax is assessed against the manufacturer.

Under this heading the Plaintiff in Error cites various sections of the Act of October 22, 1914, and states that they show conclusively that it was the intention of Congress to make the parties manufacturing the articles liable for the tax. This statement, if true, and it probably is, throws no light on the controversy. The question is not whether the tax is to be paid by the manufacturer, but when it accrues and whether it is a tax upon manufacture or upon sales, and we expect to demonstrate later in the brief that it is the latter.

II.

The manufacturer became liable for the tax when the gum started on its way from the factory where made to the various warehouses.

The Plaintiff concedes at the beginning of this branch of its argument that

> "It may, for the present purposes, be conceded that no manufacturer is liable for the tax while the product remains on the factory premises. The Commissioner granted a refund for stamps attached to such product."

This admission is sufficient to show that the tax is not a tax upon the manufacturer, as such. The

stress is here laid by the Plaintiff upon the fact that, in this case,

> "the gum was removed from the factory and placed in various warehouses throughout the country for the purpose of convenient sale."

In making the statement just quoted the Government is unwittingly straying from the facts of the petition, which may be somewhat accounted for by the fact that the résumé of facts on pages 4 and 5 of its brief, is altogether too meager. We quote from the petition (Record, p. 3), as follows:

> "That none of the products of the petitioner to which any of said stamps were affixed, had been sold or contracted to be sold, but all of said products were, on the 9th day of September, 1916, owned by and in the possession of the petitioner, but had been removed from the factory at which they were manufactured and prepared for sale, to other *factories* or warehouses of petitioner in other parts of the United States, hereinbefore set forth."

In other words, the petition does not state that these goods had been removed from the factory to warehouses, but that they had been removed to Petitioner's other *"factories or warehouses". The bulk of them may have been removed to Petitioner's other factories* and only a small portion to its warehouses. The significance of this is that, taken in connection with paragraph II of the petition (Record, p. 2), that there is no evidence of any kind to indicate that such removal was a "removal for sale". In paragraph II of the petition, it is set forth that the goods was ready for sale, while in the original factory and that they were not more ready for sale when removed to one of Petitioner's other factories or warehouses.

On page 7 of its brief the Government states that Sections 17, 18, 19 and 20 of the Act of 1914, are penal provisions to prevent the removal of articles from the factory before the stamps are properly affixed, and thus plainly imply that the tax must be paid before the product leaves the factory. As a matter of fact an examination of these sections, together with Section 21, will show that the removal is intended to be in connection with sales. We shall go into this more fully later.

The Government next attempts to invoke the rule that construction by the Treasury Department is decisive against the defendant. In this connection we desire simply to say that the Treasury Decision quoted by the Government is of too late a date and too isolated, to bring this case within the rule that a long continued construction of an Act by a Department is to be adopted by this court. Furthermore, the Act of 1914, as it comes before the court in this case, is to be considered in connection with the Act of September 8, 1916, which is a remedial measure, contemplating the relief of the taxpayer, and entitled to liberal construction. There is also to be borne in mind the Ruling of 1916 set forth in the Petition.

Following the line of argument of the Government (Brief, p. 8), it is suggested that the reason why Congress draws the line at the moment when the product leaves the factory, is because otherwise there would be great difficulty in preventing fraud and evasion of the law. This is well answered by a quotation from the opinion of the lower court (Record, p. 7), as follows:

> "Nor as an administrative matter do I see why the Government upon such construction is not adequately protected. The report of the

> foreman of a manufacturer's warehouse would serve the purpose of the Government officials quite as well as would the report of the manufacturer's factory superintendent."

On pages 9 and 10 of its brief the Government goes into a discussion of why it must have been the intention of Congress that the stamps should be used before leaving the factory. We shall take this up hereafter but desire to call the attention of the Court to the fact that this argument is finished on page 10 of the brief by this statement:

> "The tax accrues when the law requires the stamps to be attached, and when so *attached* they are used".

The Solicitor General seems not to realize that this statement would have justified the Department in refusing to redeem stamps which had been *attached* whether the articles had left the original factory or not. In other words, that would be a tax on manufacture, and the tax would be due immediately upon the completion of the articles. It would seem unnecessary further to call attention to the inconsistency of this position.

We have heretofore briefly touched upon the points raised and the suggestions made by the Plaintiff in the order in which they have been considered in its brief. We desire now to affirmatively set forth our theory of this case, upon which theory the court below gave judgment in our favor.

The first question which seems to us to logically present itself, and which also seems to be the most important one, is as to the nature of the tax sought to be imposed upon chewing gum under the Act of 1914.

The Federal system of taxation involves different taxes of different kinds. There are excise taxes upon certain kinds of businesses and occupations, which impose a tax for the privilege, or the exercise of the privilege, of engaging in such businesses and occupations. There are taxes which are an excise upon the business, but primarily imposed as an equalizing penalty, such as a tax upon oleomargarine, filled cheese, etc. There is a tax upon alcoholic liquor which, under the War Revenue Act of 1898, was characterized by Judge Taft in the case of *Green Brier Distillery Co.* v. *Johnston,* 88 Fed. 638, in the following language:

> "It is conceded that the tax attaches to the spirits as soon as they come into existence (Rev. St. Sect. 3248), and it must be further conceded that the tax is to be paid by the manufacturer unless he can put his finger upon some clause which relieves him from its payment".

There are internal revenue taxes upon the *sales* of various products, such tax accruing upon the sale, or often upon the removal for sale or consumption. This we contend to be the nature of the tax here involved, and we apprehend little difficulty in convincing your Honors, that such is the case.

The purpose and effect of this tax is to be derived from the consideration of the entire Act, especially in so far as it relates to the product of the defendant. The second paragraph of Section 5 of the Act of 1914, is a general assertion that the tax is to be levied, etc., against the products mentioned and described in Schedule B

> "manufactured, *sold* or *removed for sale*" (italics ours).

Section 17 provides a penalty against any one who

> "shall make, prepare, *and sell or remove for consumption or sale*" (italics ours), the articles contained in Schedule B.

Section 18 provides a penalty to be incurred by

> "any manufacturer, or maker of any of the articles *for sale*", (italics ours), or any one else who shall remove, detach, etc., any stamp, or who shall misuse any stamp used on any article in Schedule B with intent to evade the act.

Section 19 provides a penalty against any maker or manufacturer of any of the articles in Schedule B, or any other person,

> "who shall *sell*, send out, remove or deliver any article or commodity, manufactured as aforesaid", (italics ours), before the tax shall have been fully paid by affixing the stamp. A proviso at the end of this paragraph provides an exception as to the taxes upon these articles, and that they may, when intended for exportation,
>
> "be manufactured, *and sold or removed* (italics ours), without having stamps affixed, etc."

Section 20, in effect, provides a penalty for failure on the part of the manufacturer, or his agent, to file a declaration that no article in Schedule B has, during the month,

> "been removed, or carried, or sent, or caused, or suffered, or known to have been removed, carried or sent, *from the premises of such manufacturer or maker* (italics ours), other than such as have been duly taken account of and charged with the stamp tax".

Section 21 provides in effect that the stamp tax prescribed on Schedule B shall attach to all of them that shall have been,

> *"sold or manufactured for sale* (italics ours), thirty days after the approval of this Act."

It also provides that any person who,

> *"offers or exposes for sale"*, any Schedule B article, is chargeable as a manufacturer and subject to the taxes, liabilities and penalties imposed by law for
>
> *"the sale"* (italics ours), of such articles without a proper stamp, etc.

In the first paragraph of Schedule B, relating to the tax on cosmetics, etc., the tax is as plainly a tax on sales as language can make it, the words being,

> *"and sold or removed for consumption and sale* in the United States".

Dropping down, in Schedule B, to the tax on chewing gum, we find that the tax is a tax on the *retail* value, and that it is a compliance with the law, so far as it relates to wholesale or retail dealers, if the stamp is affixed at the time the article *"is sold at retail"* (italics ours).

It seems to us that no argument can add to the effectiveness of the foregoing provisions of the Act, taken as a whole, to show that the tax here involved is a tax upon sales, as opposed to a tax upon manufacture. There is no purpose evidenced in the Act, to levy a tax upon the business of manufacturing chewing gum or upon the mere bringing into existence of chewing gum, in which respect it differs from the tax upon liquor, referred to by Judge Taft in the decision which we have quoted.

It is clearly the purpose of this Act that chew-

ing gum shall not be consumed or sold without the payment of the tax, and that the tax only accrues upon the sale or upon the removal for consumption or sale. We do not make the foregoing assertion without authority.

In the case of *United States* vs. *American Tobacco Co.,* 166 U. S. 468, there was presented to this Court, the following state of facts:

The Tobacco Company had purchased from the internal revenue officer revenue stamps to the amount of $4,100.10, to be put upon its tobacco, as manufactured. It had attached to tobacco, still in the factory and unsold, $2,743.47 worth of said stamps and had in the factory, unaffixed to tobacco, stamps to the amount of $1,356.63. The factory, including all of the stamps, was destroyed by fire. The insurers, in settling with the Tobacco Co., paid them for all of the destroyed stamps, including those which had been affixed to packages of tobacco. The Tobacco Co., on behalf of the insurers, applied to the Treasury Department to be reimbursed for the value of the stamps, which the Department refused to do. A suit was brought against the United States for the value of the stamps, and the lower court gave judgment against the United States, which judgment the Court affirmed, as to the value of all of the stamps, including those which had been affixed. The stamps were apparently purchased pursuant to section 3362, of the Revised Statutes and following sections, as they existed in 1890-93. The first and important paragraph of said section was as follows:

> "All manufactured tobacco shall be put up and prepared by the manufacturer for sale or removal for sale or consumption in packages of the following description and in no other manner".

According to the notes in the first edition of Federal Statutes Annotated, Vol. 3, page 727, this section remained unchanged. The statute, under which the reimbursement was sought, and obtained, was the then existing section 3426 of the Revised Statutes and is set forth in the reported case. On page 476 of the opinion, the Court by Mr. Justice Peckham said:

> "The purpose of the statute was to have the Government reimburse the person who had bought and paid for internal revenue stamps which had been destroyed under the circumstances mentioned in the statute, before they had been used. To make reimbursement would be no loss to the Government, while to retain the amount paid would be highly inequitable. The Government recognized this fact by the passage of the statute in question. The company did not purchase the stamps in payment of any tax then due from it to the Government; they were purchased as a matter of convenience and to be thereafter affixed to packages of tobacco which were to be sold in the future. The tax was laid upon sales of tobacco and the stamps were resorted to as a convenient means of collecting the tax on such sales. Of course, if no sales of packages of tobacco took place upon which the stamps might be affixed, no tax had become due to the Government, and therefore if after the purchase of the stamps they were destroyed by fire, the purpose of their purchase was frustrated and the Government was not entitled, upon any equitable ground, to retain the money paid for the stamps."

On page 477, the Court used the following language:

> "Where the stamps have been destroyed under the circumstances detailed in this case, and those who paid for them apply to the Gov-

ernment to be reimbursed for their value, what materiality is there in the fact that the applicant has been paid the value of such stamps by an insurance company under and by virtue of a separate contract made with that company on the part of the claimant upon good consideration? That circumstance does not alter the fact that the Government has been paid for the stamps which were to be used for a certain purpose—the payment of taxes thereafter to become due the Government—and that by reason of the destruction of the stamps by fire they cannot be used for the purpose for which they were intended. Whatever sales of tobacco might be thereafter effected by the tobacco company would have to be evidenced by the attaching of other stamps upon the packages sold. Unless, therefore, the Government repaid the value of these stamps so destroyed, or provided other stamps in lieu thereof without any further payment, the Government would be in the position of one who retained money to which it had no equitable right".

The Court quotes part of the opinion in *Jones* vs. *Van Benthuysen,* 103 U. S. 87, in which it was held, that stamps, which had been affixed and *cancelled* ceased to have any separate and independent value, and that their value has become merged into the tobacco to which they were affixed.

We contend that the stamps which were purchased by the defendant, were purchased for a purpose substantially similar to that passed upon in the *American Tobacco Co.* case just cited, and that they were neither purchased nor affixed in payment of a tax then due. According to the allegations of the petition, the gum to which they were affixed had been completely manufactured and *prepared for sale* while in the original factory where the stamps were affixed; that they were never

removed from the *premises* of the manufacturer, but were simply removed from one of the premises of the manufacturer to another of its premises, and that no change whatever took place in their status to bring them nearer to sale by such removal. They were passively ready for sale before removal and they were in an exactly similar condition after removal. When the provisions of law which made the use of the stamps obligatory were repealed, the gum had not been sold, consumed or removed for consumption or sale and had therefore not reached the stage at which the tax had accrued. It therefore came within the provisions of the remedial Act of 1916, which provided for the redemption of unused stamps, and it would be highly inequitable for the United States to be permitted to retain the value of these stamps which evidenced a tax which had never accrued.

It is absurd to contend, that gum, which has been completely finished and stands in the initial factory with stamps affixed, may be treated in one way, and that the same gum, with stamps affixed, must be treated in another way because removed to another factory, or warehouse, of the manufacturer, although in no different condition, for consumption or sale than while resting in the original factory or warehouse. The particular premises of the manufacturer, upon which the product is stored, cannot be the test. The real test is whether the gum has been sold, or consumed, or is on its way to be sold, or consumed, by removal for that purpose. If it is not, it can make no difference in which of its warehouses or factories the gum is being stored by the manufacturer. If it is being sold, or consumed, or removed for the purpose of consumption or sale, it still makes no difference in which warehouse, or factory, of the manufac-

turer it is being stored. For in the latter instance the tax will have accrued, while in the former, it will not. If part of the original factory building were a store house and factory, and the remaining part a sales room, the removal of the gum from the first mentioned part of the building to the second, might cause the accrual of the tax, although the gum would not have been removed from the original premises, speaking of the building as such. On the Government's theory, the removal of the gum from the original factory, across the street to another of its warehouses, possibly because of over-crowding in the first, would cause the tax to accrue, while removing it from the rear of the factory to a sales department in the front thereof, for the purpose of consumption or sale would not cause the accrual of the tax because not removed from the *premises*. The fallacy of this is clearly shown in the language of the Circuit Court of Appeals for the 7th Circuit in the case of *Marhoefer* vs. *United States,* 241 Fed. 48. In this case an indictment charged the defendant, a manufacturer of oleomargarine, with defrauding and attempting to defraud the United States of a tax on a certain quantity of the commodity. On page 53, it is stated:

> "The mere fact that the 'cave' and the salesroom were in the same building is not at all persuasive. 'Removal', sufficient to establish guilt, is not determined by distance, nor is it determined by the building from which or to which the oleomargarine is taken. When the defendant moved the colored product from the 'cave' to the salesroom above for the purpose of selling it without paying the stamp tax, he committed the crime as fully as though he shipped it to an adjoining city."

Many of the provisions of the internal revenue laws are harsh in the extreme, and have been becoming progressively more so. It has long been a tradition with the Treasury Department to look, not merely to the equitable administration of these laws, but to their administration in such a way as to exact from the taxpayer every cent that a narrow construction can possibly warrant.

The Courts of the United States, while desirous of construing these laws according to the legislative intent, are not actuated by the same motive, but construe the laws, so as to bring about as equitable a result, as they can find to be consistent with the legislative purpose. As stated by this Court in *Hartranft* vs. *Wiegmann*, 121 U. S. 609, 616:

> "But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on the citizen upon vague or doubtful interpretation'."

In other words, the statute is to be construed in as equitable and favorable a manner to the taxpayer, as is consistent with the purpose of Congress.

It seems to us reasonably clear, that the tax here involved is, essentially, one upon sales or consumption, and which accrues only upon sales, or consumption, or upon removal for one of those purposes.

Even if it were possible to construe this tax as an excise upon the actual manufacture of gum, we contend, that the tax does not accrue except upon sale, or consumption, or removal for one of those purposes, and that in any event, the tax had not accrued upon the gum, involved in this case, at the time Congress repealed the tax, and that the

stamps, which are the subject of this controversy, presented a typical example of the circumstances, under which it was intended by Congress, that the purchaser should be reimbursed.

It is earnestly submitted to the Court, that not to allow the Petitioner to recover in this case, would be to permit the Government to retain the payment of a tax, which not only never had accrued, but which Congress had subsequently decided should never accrue.

Respectfully submitted,

CHARLES D. SPOONER,
Counsel.

UNITED STATES *v.* AMERICAN CHICLE COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 175. Argued January 24, 1921.—Decided June 1, 1921.

The Act of October 22, 1914, c. 331, 38 Stat. 754, imposed stamp taxes in respect of scheduled articles and commodities "manufactured, sold, or removed for sale," including chewing-gum, taxed on its retail value, and required manufacturers at the end of each month to file a declaration that no such article or commodity had, during the preceding month, been removed, carried, sent, or caused, suffered or known to have been removed, carried or sent from their premises, other than such as had been duly taken account of and charged with the stamp tax. *Held* that, whether the tax was levied in respect of the sale or of the manufacture, a payment by the manufacturer was contemplated, and, when chewing-gum had been manufactured and prepared for sale, its removal to other factories and warehouses of the manufacturer for the purpose of future sale to wholesalers rendered the manufacturer liable. P. 448.

Reversed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. R. P. Frierson* was on the brief, for the United States.

Mr. Charles P. Spooner for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The defendant in error, the petitioner below, made a claim against the United States for $6,318.56 paid by it for revenue stamps under the Act of October 22, 1914, c. 331, § 5, and Schedule B, 38 Stat. 745, 754, 763, (extended by Resolution of December 17, 1915, c. 4, 39 Stat. 2, through December 31, 1916,) which it alleges were unused after January 1, 1916, and therefore were to be redeemed under § 24 of the Act of October 22, 38 Stat. 764, and the Act of September 8, 1916, c. 463, § 411, 39 Stat. 756, 793, the stamps having been purchased within two years of the application for redemption as required by the latter act. The United States demurred to the petition and the petitioner recovered in the District Court. The question is whether the petition discloses facts upon which it can be said that the goods were not "removed for sale" within the meaning of § 5, which levies the tax upon the things mentioned in Schedule B "manufactured, sold, or removed for sale."

The petitioner manufactures chewing gum, one of the articles mentioned in Schedule B, and when the product is prepared transports it from the place of preparation, in the language of the petitioner, "to one of its other factories or warehouses, as the state of the stock therein, or the condition of the trade, may demand." The goods concerned "had been removed from the factory at which they were manufactured and prepared for sale, to other factories or warehouses of petitioner in other parts of the United States, as hereinbefore set forth." They had upon them uncancelled revenue stamps, but belonged to the petitioner and were subject to no contract of sale on September 9, 1916, when the above mentioned Act of September 8, 1916, went into effect,

providing for the redemption of stamps, as we have said. The petitioner sells only to wholesale dealers, never at retail. By its own statement it must be taken to have removed the goods for the purposes of sale to such places as seemed most likely to offer a market, although no sale had taken place. It is said that upon the language of the petition the greater part of the goods may have been sent to other factories. But it is for the petitioner to state a case and so far as appears, and probably in fact, all the removals had the same end in view.

We may assume without deciding that the tax is levied in respect of the sale rather than of the manufacture of goods, but that throws little light upon the question of the precise moment when it falls due. The words "sold, or removed for sale" clearly mean that it falls due in some cases before a sale is complete. No one we presume would doubt that if the goods were removed for the purpose of satisfying an outstanding contract for a certain amount of chewing gum, the tax would be due at the moment of the removal although the goods were not yet appropriated to the contract in any binding way. It seems to us hardly more doubtful that the same would be true if goods were removed by a manufacturer to put into the window of a retail shop kept by it on the other side of the street. If we are right these examples show that removal for the purpose of forwarding a sale is a removal for sale within the meaning of the act. But on the face of the petition that was the object of the transfer of these goods to other parts of the United States.

Notwithstanding the assumption that the tax is levied in respect of sale rather than of manufacture we agree with the Government that the statute contemplates a payment by the manufacturer. This is shown by §§ 17–19. By § 20 every manufacturer of any article provided for in Schedule B is required to file a monthly declaration that no such article has been "removed . . . from

the premises of such manufacturer . . . other than such as have been duly taken account of and charged with the stamp tax," under a penalty for neglect. This seems to us to confirm the conclusion that we already have indicated. If the petitioner should send a mass of chewing gum from its factory in New Jersey or New York to a more promising market in another State it does not appear to us that it could escape the obligation of § 20 by showing that although the gum unquestionably had left the premises of the manufacturer it was destined to another warehouse that the petitioner also owned. That does not seem to us the natural or the rational meaning of the words used. It is said that the construction of a similar Act of June 13, 1898, c. 448, 30 Stat. 448-463, was the same while that was in force, and that presumably the later act adopted the construction. The argument is another confirmation of the view that we adopt.

The tax is four cents upon packages of not more than $1.00 of actual retail value, with four cents for each additional dollar, but this rough reference to retail price is far from implying that the package must have been sold in order to fix the tax. It appears to us entirely natural that Congress should look to the original place of manufacture as the place for the identification of the taxable goods and to the moment of leaving it, except in exceptional cases, as the time for the attaching of the tax. It seems to us to have done so in sufficiently unmistakable terms.

Judgment reversed.